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No. 223

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

SAMUEL JOSEPH RUGENDORF,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certriorari to the United States Court of Appeals for the Seventh Circuit

Reply Brief For Petitioner

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May it Please the Court:

In view of the nature of the respondent's presentation, we deem it appropriate that recurrence be had to the issues between the parties and to the history of the development of those issues.

Petitioner's home was searched on the authority of a warrant issued pursuant to an affidavit filed before the United States Commissioner.

In the trial court, the petitioner challenged the legal sufficiency of the warrant and further moved to suppress the fruits of the search on the grounds that the application for the search warrant was untruthful. (R. 2)

Petitioner proved two of the averments of the affidavit to be untruthful. One of the averments proven to be untruthful, was the supposed statement of an unnamed confidential informant. (R. 19-21; *Cf.* R. 7)

The other averment proven false, purported to come from a *named* informant. (*Cf.* R. 7) However, the named informant took the witness stand and swore that he had never given such information as that attributed to him within the affidavit supporting the application for search warrant (R. 17).

The motion to suppress, although filed in advance of trial, was heard when the presentation of the government's evidence had almost concluded (R. 17), and involved the presentation of evidence by the defendant. It was directly interwoven with the trial itself, although this evidence was not heard by the jury.

At that point, the defendant renewed a request which he had made unsuccessfully in advance of trial, for disclosure of the identity of the alleged confidential informants referred to in the affidavit. The defendant made it clear that this information was needed by him in support of his motion to suppress (R. 13).

The defendant made it equally clear, not once but several times, that this information was needed to assist him in his defense on the merits (R. 13, 14, 23, 24).

The government never contended at the trial that the information was irrelevant, or that it was sought in an improper manner, or that it was sought in the wrong kind

of proceeding, or that it was sought for the wrong purpose, or that it was sought at the wrong stage of the trial.

The government stated only that disclosure of the information "might . . . probably" (R. 22) cause a "possible murder" (R. 22).

The government assigned no other grounds for withholding the information.

None whatever.

Obviously impressed by the government's suggestion that a life was at stake (a suggestion which the defendant would heartily have seconded in its application to himself), the court expressly foreclosed the defendant from further inquiry into the matter (R. 24). The court further stated that since the affidavit said that there were furs in the basement, and in fact furs were found in the basement, the significant portion of the affidavit was truthful, so that it did not matter whether the balance of the affidavit were false or not (R. 25).

From the resulting conviction, the defendant appealed. In his brief, he addressed himself to the issues delineated at the trial. The government answered, stating that the doctrine of *Roviaro* ". . . . is applicable only when the disclosure is relevant and helpful to the *actual defense* of the accused," (Gov't. Br. in Court of Appeals, p. 17; emphasis copied) and that disclosure was inappropriate in a search warrant proceeding (*Ibid.*, pp. 16-17). The government also argued that *Rovario* was "applicable only when the informer 'helped set up the commission of the crime and was present at its occurrence,' " (*Ibid.*, p. 13).

In his reply brief in the Court of Appeals, the defendant attempted to meet the new issues thus raised. An opinion was duly rendered, holding that disclosure of an identity

of an informant could not be compelled in a proceeding to suppress the product of a search warrant, and further holding that *Roviaro* applied only where the informant was present at the crime and helped set up its commission (R. 69-74).

Defendant then petitioned for a writ of certiorari, citing all of the contentions theretofore advanced in opposition to his request for disclosure of the identity of the informant. In opposition, the government argued, essentially, that the opinion of the Court of Appeals was proper; that such disclosure is appropriate only "where it is essential to the individual's right to prepare his defense" (Br. in Opposition, p. 9); that the trial court's rulings were "overly cautious", but justifiable as a matter of discretion (*Ibid.*, p. 11); and that defendant was not entitled to aid his defense on the merits because the informer had not contrived and "played a direct and prominent part in the very offense for which the accused was convicted". (*Ibid.*, p. 12)

Certiorari was granted, and the defendant submitted briefs to your Honors on the merits of his case. He has discussed all of the grounds previously assigned in support of the denial of the information sought by him.

The government has now filed its brief on the merits. In that brief, the government:

A. Abandons its earlier contention that disclosure is appropriate only where the informant is first proven to have been a moving party in the offense.

B. Abandons the contention that disclosure cannot be compelled in any proceeding seeking to suppress the fruits of a search warrant, and states instead that one seeking such disclosure "must show that there is reason for apprehending that a fraud has in fact been committed upon the magistrate." (Gov't. Br. p. 33).

C. Suggests that no fraud was committed upon the magistrate because the application to the magistrate was made by policeman A, repeating what he had been told by policeman B. So long as B was accurately quoted, the government argues, then policeman A was not lying, and policeman B was not there, so that in effect no lie was told. (Gov't. Br. p. 46).

D. As to petitioner's contention that the information was necessary to his defense on the merits, the government argues that if this claim had been properly made in the trial court, "it might well have justified disclosure under *Roviaro*." (Gov't. Br. p. 23). The government then discusses the point, concluding: "We have strong doubt, therefore, whether petitioner's showing would have met the test of *Roviaro*." (Govt. Br. 53).

Besides, the government states, the defendant has been inconsistent in his position.

• • •

A complete reply to the government's painstaking and intensive discussion, would impart to this brief a length inconsistent with the status of this case upon this Court's Summary Calendar. With the indulgence of the court, we will address ourselves briefly to the essential thrust of the points presently urged by the government.

I.

THE EFFECT OF HEARSAY RECITATIONS UPON THE VALIDITY OF AN AFFIDAVIT SUPPORTING AN APPLICATION FOR A SEARCH WARRANT.

We are fearful that the government has misapprehended our complaint with reference to the legal sufficiency of the search warrant.

It is not our "contention that the affidavit in the instant case was legally inadequate because founded on hearsay." (Gov't. Br. 25).

Rather, it is our complaint that the application was legally insufficient because founded on *uncorroborated* hearsay.

We agree with the government that *Jones* v. *United States*, 362 U.S. 257 is dispositive of the issue whether a search warrant is invalidated by hearsay recitations within the application.

But we also agree strongly with the qualification expressed in *Jones* that such hearsay presentation is sufficient only when "a *substantial* basis for crediting the hearsay is presented." (362 U.S. 269, emphasis added.)

In the Court of Appeals, the government argued:

> "In the instant case, the 'substantial basis' is exactly the same as that approved in *Draper* v. *United States*, 358 U.S. 307 and *Jones* v. *United States*, 362 U.S. 257, *i.e.*, an informant who had proven to be reliable in the past." (Gov't. Br. in Court of Appeals, p. 10.)

It is patent from the government's affidavit (R. 6-8) that at the outset, the government relied for corroboration of the alleged informant's story, principally upon an alleged relationship between petitioner and his brother, Leo, in the meat business, and upon the agent's sworn statement, falsely attributed to a policeman, that petitioner managed a business at which the fur thieves had been seen. In fact, that was falsity to the second power. It was false not merely in the aspect of what the informant had said, but in the aspect of what the agent had represented the informant to have said.

pparently, between trial and appeal, the government
ired an appreciation of the indelicacy implicit in
ting to the proven falsehood of its own officer as
bstantial corroboration" of an unnamed informant.

he government now claims that the informant's story
corroborated by the fact that the description of the
given by the supposed informant, matched those of
e only reported burglary involving furs similar to those
ribed by the informant." (Gov't. Br. 26). This seems
s something of a logical circle lacking either entrance
xit. The Mountain Brook furs were selected as those
t closely matching the informant's very loose descrip-
(R. 8), and that description was then deemed reliable
use it was not inconsistent with the equally generalized
icial" description of the Mountain Brook furs (R. 7).
agent affiant, in fact, swore that the Mountain Brook
t was the only one in the past six months whose loot
ched the informant's description; but in fact, more
a quarter of the furs had been stolen during that
od in Shreveport, Louisiana, according to the govern-
t's subsequent evidence (R. 15).

e believe that the government's present reliance on
description of the furs as corroboration of the alleged
rmant's story is completely misplaced. It is obvious
the frequency of theft is such, that it will almost
ys be possible roughly to match a loose description
quantity of merchandise with a description of some-
g which has been stolen somewhere. But this is far
"substantial corroboration." In view of the dem-
rated falsity of those representations within the af-
it most strongly relied upon for corroboration, the
osed coincidence between the informant's description
the Mountain Brook furs, is even less important as
oboration than would otherwise be the case.

The foregoing presentation is only one demonstration of the government's apparent willingness to change the theory of its case, with each shift of the winds of evidence and argument. We believe that an unfortunate frequency of such abrupt reversals of direction, are cited within this Reply.

II.

THE AVAILABILITY OF THE IDENTITY OF INFORMANTS FOR THE PURPOSE OF SUPPRESSING THE PRODUCT OF A SEARCH WARRANT.

The government now appears substantially to have abandoned its earlier contention that the identity of confidential informants can *never* be compelled in any proceeding seeking to invalidate a search warrant. (Gov't. Brief in Court of Appeals, p. 17; Brief in opposition to certiorari, p. 9; and see Opinion of Court of Appeals, R. 73-74.)

Within its present brief (pp. 29-52), the government takes quite a different tack, stating:

> "It is our basic position that one who demands disclosure of the government's confidential sources in order to show that a search warrant was obtained by misrepresentation must show that there is reason for apprehending that a fraud has in fact been committed upon the magistrate." (Gov't. Br. 33).

The government does not suggest the method by which reason for such apprehension is to be demonstrated. If the agent submits an affidavit alleging that his information derives from a confidential informant, a defendant will have no way of showing that the information, in fact, came from wire tap, or illegal trespass and search, or any other unlawful means. He is precluded from showing that the informant does not exist, because obviously he cannot begin to make such proof without testimony from

the agents. The self-evident truth of this proposition serves to demonstrate that what the government is really asking, is that the judicial function not be performed in such cases, and that reliance be placed solely upon the integrity of the police.

Stated another way, the government asks to be relieved of such embarrassing showings as that made in *United States* v. *Pearce*, 275 F.2d 318 (7 Cir. 1960), wherein the confidential informant of "past proven reliability" turned out to be a man who had never given information before and who did not give it that time. The government seeks refuge behind the guaranteed anonymity of the supposed confidential informant, in the teeth of common knowledge that that term is "a frequent euphemism for a wire tapper." *United States* v. *Coplon*, 185 F.2d 629, 639, 2 Cir. 1950.

The government goes to considerable lengths, unnecessarily to justify the informant privilege.[1] No attack is made upon the privilege as such. The only attack made, is upon the government's contention that it can withhold information useful to the defense of a prosecution commenced by it, and that it can obtain a search warrant through a supposed informant without ever showing that the informant truly existed.

At pages 36 and 37 of its brief, the government cites seven cases involving attacks on an informant, and cites

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[1] In the belief that it may aid the Court in evaluating an opus heavily relied on by the government (Br. 29, 30, 34, 35) we point out that Messrs. Harney and Cross, authors of "The Informer in Law Enforcement", are Illinois state narcotics agents who also authored a guide book for narcotics policemen.

another case wherein a trial judge took judicial notice of the likelihood of retaliation upon an informant in view of past incidents of that type.

But this presentation, dramatic though it may be, completely begs the issue. If the government wishes to withhold the identity of an informant, there is no power on earth which can compel disclosure. The only requirement imposed on the government, is that it not seek to forfeit the life or liberty of one of its citizens while withholding material information.

The ultimate truths of the case at bar, are:

1. This is *not* an attempt to sue an informant for slander, or idly to inquire as to the identity of petitioner's detractors, or to rummage through police files for the purpose of impeding an investigation. Cf. *In re Quarles and Butler*, 158 U.S. 532, 535-536.

2. If petitioner were truly guilty, or if the government had really believed that its informant was in danger, the most pedestrian of normal investigative procedures would have resolved both problems. Such tactics as routine surveillance of petitioner's home would have produced strong evidence, probably against others involved in the case as well as petitioner, in a short time. And the case thus built *would not* have depended upon the informer for its essential facts.

3. It was the government, and not the petitioner, who chose to expose to the searchlight of litigation, the supposed fact of the informer's existence. It was the government, and not the petitioner, who chose to proceed in a manner which made the informant the crux of the case.

The government can protect its informants where necessary by respecting their confidences, and by using in-

formation obtained from them as a basis for further investigation. But the government can protect neither its informants nor the rest of its citizenry by basing criminal prosecutions on an informer's story while taking refuge as to his identity and other pertinent facts relevant to a determination of the defendant's guilt or innocence.

It is always possible that an informant may be exposed to retaliation—social, economic, and even physical—if his identity be disclosed. But from that fact, it simply does not follow that a defendant may not inquire whether his right to be secure against an unreasonable search or seizure, has been violated.

Nor does it follow, that a defendant may be imprisoned on the basis of conjecture as to what an informant might have said had he been required to testify.

Much less, does it follow that the informant privilege is a government sanctuary which relieves agents from the necessity of a thorough and reasonable investigation. In the case at bar, normal investigative techniques would have sufficed to settle the issue of defendant's guilt or innocence. The government, for some reason, preferred to rely entirely on its informer.

One thing is certain: Defendant's basement was not intended by the thieves as the ultimate respository of the furs. The furs would have been moved, as quickly as a disposition could have been arranged. A relatively unimaginative surveillance would have done much to settle the issue of defendant's complicity and would also have resulted in the apprehension of the guilty parties when the furs were moved. Even assuming petitioner's guilt, the government claims that others were involved (R. 6-8),

and it is surprising that the agents were willing to proceed *only* against petitioner.[2]

Even a simple anonymous telephone call to this petitioner by an agent, representing himself as a "friend" and warning petitioners to get rid of the furs in his basement, would have yielded substantial and persuasive evidence either for the government or for the defense.

But the agents knew a good thing when they saw it. They were in possession of information which the defendant could not possibly contradict. The more innocent he was, the less likely that he could even explain the evidence. The informant privilege was used not as a shield, but as a sword.

Within *six days* of the time of the alleged disclosure by the informant, a search warrant was obtained and executed. No other investigative technique was even attempted, so far as the record shows.

For after all, what investigative technique could possibly compare with reliance upon the confidential informant? Anything further that might be done, might demonstrate innocence. At the very least, it would give the defendant an opportunity to confront and to cross examine an accuser. How much better, to stop while one is winning, and to present to a defendant only a faceless, nameless, amorphous accuser who can neither be impeached, cross-examined, nor shown to have proceeded unlawfully in the obtaining of his information.

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[2] Petitioner had a spotless record and good reputation (R. 25-30). The others were three "accomplished burglars" (R. 8) and a "fence" (R. 7), according to the agent. It would be imagined that ordinarily the federal police would be anxious to convict those professional criminals.

The confidential informant is the very devil of a fellow.

* * *

The government contends that society really has nothing to fear from the confidential informant, since his activities are closely scrutinized by the very police whose duty it is to protect the Constitution on behalf of all of us.

The arguments made by the government in support of this proposition, are interesting to a lawyer, and will be doubly so to historians yet unborn.

First, the government argues that where a search warrant has been obtained, the officer is required to go on record in advance of the search as to what he expects to find, so that the search could not be justified retroactively (Gov't. Br. 40-44). The government contends that the policeman will then either find the specified property, or he will not, so he is unlikely, in the government's view, to "overstate [the] reliability" of his "unknown tipster." (Gov't. Br. 44). That, we submit, is a flagrant non-sequitur. With at least equal cogency, it can be argued: Either the goods sought by the officer will be found through the search warrant, or they will not. If they are not found, the matter is closed, and the courts will have no occasion to call upon the officer to justify his conduct. If, on the other hand, the goods are found, the reliability of the informant is thereby established, and the officer is not called upon by the courts to justify his conduct. Thus, an officer has nothing to lose by acting on the wildest of tips. The information he receives may be good or bad; but that is of no real concern to him. Whether his informant speaks false or true, the policeman will not be questioned further.

And what of the situation in which the police are faced with the choice between suffering an acquittal because the information has been obtained unlawfully (*e.g.* by illegal

trespass and search or by wiretap), or obtaining a conviction by falsely claiming that the information was received from a "confidential informant"?

The government states that such a possibility may be discounted because no policeman would do such a thing "under the penalties of perjury and disciplinary action." Yet, within the same paragraph, the government cites *United States* v. *Pearce*, 275 F.2d 318, 7 Cir. 1960, wherein an agent, one Stoelting, was shown flagrantly to have falsified, within his search warrant application, his sworn averments relative to a supposed confidential informant. The government's assurance (Br. 44, 45) would be more convincing if the government were to show what penalties were invoked against Agent Stoelting in consequence of his activities in the *Pearce* case. Not without considerable confidence, we offer at this late stage to withdraw this aspect of our argument, if the government will file an affidavit showing that any "penalties of perjury and disciplinary action" were imposed upon Stoelting by way of deterring a repetition of such misdeeds by Agent Stoelting himself or by other agents.[3]

But, the government solemnly assures us, it is so unlikely that any agent would do what Stoelting was proven to have done, that such exposure is "a risk which can safely be taken by . . . society" (Br. 45). We reply that what society is actually risking here, is the effective end of the viability of the protection granted by the Fourth Amendment. Unlike the writer of the government's brief,

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[3] The *Pearce* opinion shows that Stoelting's superior, under whose direction the affidavit was presumably prepared and to whom it anonymously referred, knew that there was no "confidential . . . source which in the past has proved reliable." 275 F.2d 322.

we have no way of predicting the likelihood that any future agent will attempt to do what Stoelting did, while working with his superiors, in the *Pearce* case. We can predict with reasonable certainty, only that if the government's position be sustained, and if such attempts are made in the future, they could not possibly be detected.

• • •

The government's final argument on this point, is that the petitioner made no showing which would cast doubt upon the representations made within the government's affidavits.

That is a very revealing argument. At an earlier point in its brief, the government contended that disclosure should be required in a search warrant proceeding only where "there is reason for apprehending that a fraud has in fact been committed upon the magistrate" (Br. 33). It is, therefore, of interest to see what might constitute such reasonable apprehension of fraud in the view of the government.

The government points out that "the truth of the informant's story" was not disproven (Br. 45). This is a startling assertion, when one considers that the informant's story was never disclosed, except for the ultimate allegation that there were furs in the defendant's basement.

We do not believe that the record will support the government's optimistic assertion that the informant "gave a description of (the furs) which corresponded almost precisely with the official description of the furs stolen in Mountain Brook, Alabama the previous month." (Br. 45). In fact, all that could possibly be said is that the informant's loose description was not inconsistent with the "official" and highly generalized description of the loot from Mountain Brook (R. 7).

In an improbable context, the government argues that only someone who had seen the furs in the Rugendorf home would have known certain things ultimately to be true. Perhaps. But any wiretapper, or trespasser might with equal probability have "known" the facts and any recipient of an anonymous tip could have *believed* such facts. The government here (Br. 46) confirms our apprehension, previously expressed, that attempts may be made to establish the reliability of an informant by the fact that his prediction is ultimately confirmed.

The government states it differently:

> "There is no reason why the items uncovered in a search may not be used to confirm, as they do here, the authenticity of a purported eye witness's description made prior to the event."

Not at all. Such findings do not confirm the *authenticity* of the informer's story; they merely confirm its truth, in one limited aspect. But the authenticity of the story, and the very existence of the informer, remain conjectural in such circumstance.

The logical conclusion from the government's argument, is that it is never necessary to attempt to corroborate the story of an informant. If the informant is right, he is "corroborated" by the findings made pursuant to a search warrant. If he is wrong, the issue is never exposed to the alembic of judicial scrutiny. Therefore, corroboration of an informant is necessarily a total waste of time which might be better spent in the recruiting of new informants.

In support of that argument, the government states that the affidavit was proven to be inaccurate only in two

"minor" particulars. Numbered by the government (presumably in order of inconsequentiality), they are:

1. That petitioner and Leo were in business together; and

2. That the Rugendorf Bros. Market was managed by petitioner (Br. 46).

The government omits reference to a third proven falisity. We will supply it:

3. That officer Kelleher told Agent McCormick that petitioner managed the Rugendorf Bros. Market. (R. 17; *Cf.* R. 7)

If that proven falsity has no other significance—and it clearly does—it is at least a very serious reflection upon the ability of the agents, by relayed hearsay, accurately to report the substance of information received from an informant, even where that informant clearly exists.

Three proven material falsehoods within the affidavit seeking a search warrant do not apparently satisfy the government's artificial standard of "reason for apprehending fraud" (Br. 33), because the items were "of peripheral relevance" (Br. 47). To that contention, two replies are appropriate. First, all matters deemed by the government to be of *central* relevance proceed from an unidentified informer. The defendant has shown to be false, almost everything within the affidavit whose falsity might reasonably have been established. How much further could he possibly have gone? Rhetoric will not obscure the fact that the requirement which the government seeks to impose as a condition of the disclosure of an informant, is actually that the defendant must somehow show that the informant does not exist before the government will consent to tell him who the informant is.

Secondly, the relevance was not "peripheral". The allegations proven false, were the vital "substantial basis for crediting the hearsay" required by *Jones*, 362 U.S. 269.

The government urges that the whole thing was unnecessary in any event since petitioner and Leo were "intimately linked as brothers" (Br. 47).

No. They were not "intimately linked", except by false statements in the Agent's affidavit. They were merely brothers, as were Cain and Abel, Jacob and Esau, Richard and John of England, and innumerable other instances of such "intimate" linkage. Probably for the first time, it has been urged to your Honors that common parentage constitutes a "connection" (Br. 47) which bridges the gap between respectability and opprobrium.

The government contends that petitioner's guilt was not in issue when the affidavit was filed. (Br. 47) But surely, the probability that the furs were in petitioner's home was then in issue, and this issue was presented to the magistrate by assertions which were subsequently proven to be flat untruths.

Taking a different tack, the government contends that it was only "an honest, and quite natural, mistake of fact" (Br. 47) because petitioner had *ten years* earlier been associated with the meat market. To this, the short answer is that the affidavit did not say that petitioner had been associated with Rugendorf Bros. Market ten years earlier. Such an assertion would have been absurd and legally meaningless. The government wanted a meaningful assertion. It got one.

The government contends that a portion of the affidavit proved false is "ambiguous" (Br. 48 and 49). If there is an ambiguity, it relates only to whether agent McCormick

lied about what officer Kelleher had told him, or whether on the other hand, McCormick lied about the petitioner's employment. The "ambiguity" is just as shallow as that. The government states that the issue could have been resolved if the petitioner had taken McCormick's deposition. By that suggestion, the government appears actually to be urging that it might have been possible to prove that the affiant, agent Moore, had falsely reported what McCormick told him. Thus, the government would burden the defendant with the necessity of proving which of the agents had lied, as a condition of granting the defendant relief from those falsehoods.

We regard the government's argument as totally lacking in persuasiveness; but we regard the suggestion relative to McCormick's deposition as utterly fantastic. The day before the trial, the prosecutor advised defense counsel that McCormick "is in a hospital having an operation." (R. 18). Petitioner made it clear that he desired to examine McCormick, (R. 18) but any attempt so to do would have been fruitless indeed. Keenly aware of our responsibilities, we state to your Honors that there is not, and could not be, any suggestion within the record that McCormick would have been, within the limitations of medical feasibility, available at any time for any such deposition or for anything else.

More to the point, very shortly after the cited colloquy, the trial court foreclosed further questioning of the agent affiant (R. 24). We are unable to imagine the basis on which the government feels free to argue that a request to take McCormick's deposition would have been appropriate. The court made it very clear that the truth or falsity of McCormick's assertions, and the reason for such falsity, were totally beside the point (R. 25), and that the issue was closed (R. 24).

The government concludes that the trial court was correct "in minimizing the importance of the two inaccuracies" (Br. 49). With equal force, any conceivable "reason for apprehending a fraud" (Br. 33) must necessarily be susceptible of being similarly minimized, since it cannot possibly go to the ultimate question whether an informant truly exists and, if so, what he is alleged to have said.

As to the collateral information sought by the defendant —the place of the conversation with the supposed informant, and the day of the informer's observation of the furs— the government seems to gain confidence with each new brief. These actions, which were termed "overly cautious" in the government's brief in opposition (p. 11), are now regarded as "proper" in view of "the dangerous potentialities of the questions" (Br. 50).

Any question, we suppose, has dangerous potentialities, although the word "dangerous" may not have the same connotation to an accused as to a policeman. The suggestions of potential danger cited by the government, thin out almost to the vanishing point. There is no possible inquiry which could not be shown to be at least as "dangerous" as those actually propounded.

The government suggests (Br. 51) that express areas of interest could have been explored. The government does not, however, suggest how this might have been done. The questions successfully objected to, were the last questions that the court permitted to be asked of the witness (R. 23, 24). And the foreclosure was effective, not only as to that witness, but as to the very subject matter (R. 25).

• • •

We believe and submit that the Fourth Amendment guarantees will lose all practical effectiveness and enforceability, unless disclosure of supposed confidential sources is required in *all* criminal cases dependent upon a search warrant obtained by disclosures relayed from such informants.

It is not necessary to adopt that rule in order to grant relief to the petitioner here. Petitioner has made a clear showing of presumptive fraud in the affidavit. But this is entirely fortuitous. A policeman can avoid such occurrences in the future, by the simple expedient of limiting his "corroboration" to matters of which the defendant has no knowledge. An example is the concept of one unknown informant "corroborating" another, as the government here suggests. (Br. 29, fn. 10.)

Certainly, at the very least, *any* defendant in such a case is entitled to more than was granted to petitioner in the court below. An *in camera* examination of the supposed informer by the trial court, for example, might have been of some help without presenting any possibility of exposing the informant unnecessarily. A defendant, of course, is entitled to advocacy, and not merely to judgment. Such procedure would grant only an imperfect protection of his rights. But it would be *some* protection. Petitioner had none at all.

III.

THE AVAILABILITY OF INFORMATION RELATING TO AN INFORMANT, FOR DEFENSE ON THE MERITS.

At page 51 of its brief, while attempting to show that the petitioner was not entitled to information in support of his attempt to quash the search warrant, the government argues that certain inquiries by the defendant were

actually designed to enable the defendant to defend himself on the merits of the case, and, therefore, had nothing to do with the search warrant.

At page 52, the government argues that the defendant was not entitled to the information in order to defend himself on the merits, since he did not raise that issue in the trial court.

Fortunately, pages 51 and 52 do not confront each other in American bookbinding. They are, appropriately, back-to-back.

If further comment is necessary, we would state that in the trial court, the defendant forcibly, on numerous occasions, stated clearly that information relative to the identity of the informant was sought by him not merely in order to suppress the evidence, but also to further his defense on the merits (R. 13, 14, 23, 24, 75).

The government argues that the requested information "would not necessarily" have been persuasive on the issue of petitioner's guilt or innocence. This is indeed a novel test of the availability of evidence to a defendant. It is clear that the evidence would have been relevant; but since the defendant was denied access to it, it can always be contended that the evidence would "not necessarily" have been persuasive, so that the defendant was properly denied such access.

Such legal levitation provides a platform from which the government reaches the ultimate plateau of contending that the informant played no part in the offense (Br. 52, 53). It is comforting to have this assurance from the government; one could not possibly obtain it from the record. But what the government really means, is that the informant was not proven to have participated in the

crime. And this failure of proof is quite a logical consequence of the fact that the government took sanctuary as to all facts relating to the informant.

Taking a shallow view of the defendant's contentions, the government very correctly states that "it remains a matter of conjecture whether the informant would materially illuminate the question of petitioner's knowledge." (Br. 53). Indeed it does; and that is a compelling reason why the conviction should not be allowed to stand. The defendant has been "conjectured" into a penitentiary sentence.

The government advises this Court that the defense requests for information concerning the informant, were made "without exception" in connection with the proceedings on the motions to suppress. The record will not support that assertion. In advance of trial, the defendant requested the identity of the informants, stating that it was "necessary to a proper defense" and that the defense desired to call the informants as witnesses if the government did not (R. 14).

The government further tells your Honor that the defense desire to obtain such information for a defense on the merits, was expressed in terms "too oblique and indefinite" to let the court know what was wanted. Examples of these "oblique and indefinite" requests are as follows:

> "Can we at least not have the date (on) when it took place so that Sam Rugendorf can defend himself?" (R. 24).

> "It would accord with fundamental fairness for us to know when it is this informant said he saw it, so I can account for the activities of Sam Rugendorf on the day the confidential informant says he saw it there." (R. 23).

"If (the informer) takes the stand it will demonstrate that Sam Rugendorf had nothing to do with it." (R. 14).

"We are entitled . . . to the names of the informants so that we may . . . seek out the informants ourselves and call them to the witness stand . . . ." (R. 14).

The government complains that in the Court of Appeals, petitioner first discussed this issue in his reply brief. But before that time, the point was never in issue. As previously observed, in its brief on appeal the government for the very first time contended that it was the nature of the proceeding, rather than the imminent death of the informer, which governed the defendant's right to this information. A shifting of ground clearly took place, but not on the part of the petitioner.

The rule, that on review a prosecution is rigidly bound to the theory on which the case was tried below, may fairly be regarded as monolithic. *Pearson* v. *United States,* 192 F.2d 681, 694, 6 Cir. 951; *Bollenbach* v. *United States,* 326 U.S. 607, 610, 614-615 cited with other authorities at *Wilson* v. *United States,* 250 F.2d 312, 325, 9 Cir. 1957. In the case at bar, a different ground has been asserted for sustaining petitioner's conviction, every time the government has written a brief.

The government also argues that information short of the identity of the informant would have been of no help to the petitioner, because he was never home in the day time except on Sunday (Br. 58). That argument actually presumes that the furs were seen by the informant during business hours, when petitioner was not there. And in any event, there is no reason why the petitioner should have been limited to learning only the date of the informer's visit.

In short, the government argues that the information sought by petitioner was properly denied him because: (a) the answer would have given him enough information to enable him to identify the informant, and (b) the answer would not have given him any helpful information, so that he was not prejudiced by the denial.

And, of course, the government forcefully contends that the defendant's presentation has not been consistent.

IV.

THE SUFFICIENCY OF THE EVIDENCE.

The government points out that the furs were found in petitioner's home, in one of several closets that opened off "a recreation room showing every evidence of regular use by the occupants." (Br. 59). If there was "every evidence" it is to be imagined that the government would be able to cite at least some of it. If by "the occupants" the government uses a term which is intended to embrace the petitioner, the record affords no basis for that assertion.

The government further argues that the actions of the thieves show that they did not believe that the petitioner "could be expected to call the police the moment he chanced upon the loot." (Br. 59) The government would apparently sustain the conviction by reason of the inferences which it draws as to the opinion of the thieves relative to the character of the petitioner. If the agents had desired to know whether the petitioner would have called the police on learning of the existence of the furs, they need only have made an anonymous telephone call to him to advise him that the furs were there, and then observe his actions.

The government argues that "both petitioner and Mrs. Rugendorf" were impeached by the contrary testimony of agent Lee on seven points (Br. 60, *Cf.* Br. 7-11). But of

the seven claims of impeachment, four relate only to the actions of petitioner's *wife*, at a time when petitioner was not present. As to the three points claimed to relate to the petitioner, two are at least very highly equivocal and have no relevance to the merits of the case.

The government obviously places principal reliance on the supposed impeachment of the petitioner relative to whether brother Leo had returned the residence key entrusted to him during petitioner's vacation.

The government originally argued that it was absurd to believe that Leo would have returned the key if he had placed the furs in petitioner's basement. It was "illogical", the government contended, to believe "that Leo would have placed the furs in the basement and then given away his only means of taking the furs out of the basement by returning the key to the defendant." (Gov't Br. in Court of Appeals, pp. 6 and 7).

As we observed in our petition for certiorari, a residence key can generally be copied at a price of 25¢. So the government now contends that Leo returned the key, and that, therefore, petitioner is "impeached on a key point in his story" (Br. 60).

From such supposed impeachment (by only one of many witnesses theoretically available to contradict petitioner on that point), the government draws a novel conclusion. It cites an opinion in a civil case as authority for the proposition that a witness may be so unconvincing as to persuade a jury that the truth lies in the *opposite* of his testimony (Br. 60, 61).

We do not question the validity of that principle in a civil case. But in a criminal case, the principle has no application whatever. A conviction can be sustained only on the strength of the prosecution, and not on the weakness

of the defense. *U. S.* v. *Bruno*, 153 F. 2d 843, 844, 3 Cir. 1946; *U. S.* v. *Laffman*, 152 F. 2d 393, 395, 3 Cir. 1945. It borders on the fantastic, that the government should argue that the conviction should be sustained because the jury might have believed that the truth lay in the opposite of the story told by the defense witnesses. There is absolutely no basis for such a speculation on the government's part. If there were, such assertion would be tantamount to a confession of error.

It is to be noted that the government did not even attempt to answer our contention that only *constructive* possession of the contraband had been shown. Instead, the government argues that the jury could infer actual possesion by disbelieving the defendant's disclaimer of knowledge.

Had that argument not been made, we would have regarded it as puerile, and an imposition on this court, to make a point so fundamental as that the burden of proof was on the prosecution and not on the defense.

But so stark a peril is posed by mechanistic attempts to justify freedom from judicial scrutiny in the employment of the confidential informant, that it here threatens the very presumption of innocence which is the bedrock of our criminal jurisprudence.

CONCLUSION.

There is no logical basis on which the result below can be sustained. We earnestly pray that the judgment be reversed.

Respectfully submitted,

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